SUPREME COURT, U. S.

No. 547

AUG 29 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

NORTHWEST ENGINEERING COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No.

NORTHWEST ENGINEERING COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

To the Justices of the Supreme Court of the United States:

Northwest Engineering Company, Petitioner herein, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia, entered on June 3, 1967, granting the National Labor Relations Board's petition to enforce its Order dated September 21, 1964, as amended on March 3, 1966, which requires Petitioner to cease and desist from certain alleged unfair labor practices and affirmatively, to post a notice and to bargain with the Union on demand.

On March 24, 1967, the court below handed down its opinion in the matter. On April 5, 1967, Petitioner petitioned to reconsider, as did the Union. On April 21, 1967, both petitions were denied. On June 3, 1967, the court below ordered, adjudged and decreed the Petitioner herein to abide by and perform the direction of the Board's order, as amended.

OPINIONS BELOW

The original decision of the National Labor Relations Board is reported at 148 NLRB 1136 (1964). The Board issued a Supplemental Decision and Order reported at 158 NLRB No. 48 (1966). The decision of the Court of Appeals is reported in 376 F.(2d) 770, and is printed in the Appendix hereto, at pp. App. 1-6.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia was made and entered on June 3, 1967, and a copy thereof is printed in the Appendix at pp. App. 7-8.

The jurisdiction of this Court is invoked pursuant to 28 USC §1254(1).

QUESTION PRESENTED

The question presented here arises out of a policy shift of the National Labor Relations Board manifested by its decision in *Bernel Foam Products Co.*, 146 NLRB 1277 (1964), which directly overruled *Ajello Dairy Farms*, 110 NLRB 1365 (1954). Specifically, the question is important in the administration of the National Labor Relations Act in that the basic right of employees to select or reject representatives for purposes of collective bargaining through the election procedures established by Con-

gress are being circumvented. This case gives the Court the opportunity to clearly enunciate on the following substantive and procedural question:

> Does the power of the National Labor Relations Board under §10(c) of the Act to order affirmative relief in aid of a cease and desist order include the power to order an employer to recognize and bargain collectively with a union where—
>
> (1) the employees reject the union in an election conducted by the Board at the union's instance?
>
> (2) the union knows of alleged unfair labor practices prior to the election, but does nothing until after it loses the election?
>
> (3) the unfair labor practices are not aggravated and do not include discriminatory discharges, clear and vitriolic threats of retaliation or reprisal or a rejection of the collective bargaining principle?
>
> (4) the proof of majority status of the union *ante* election relied on by the Board is
>
> (a) shown to have been collected by a union organizer by misrepresentations as to its use;
>
> (b) admitted into evidence without affirmative proof of authentication.
>
> (5) there is no charge filed within the six (6) month statutory period alleging a refusal to bargain with the union.

PROCEEDINGS BELOW

These proceedings grow out of a petition for certification filed by United Steelworkers of America, AFL-CIO (hereinafter "Union"), with the National Labor Relations Board (hereinafter "Board"), on March 8, 1963, pursuant to §9(c) of the National Labor Relations Act, as amended,

29 USC §151 *et seq.* (hereinafter "the Act"), seeking an election among employees of Northwest Engineering Company (hereinafter "the Company"), Petitioner herein. On May 8, 1963, the Board conducted such an election in which 743 of the 753 eligible voters participated. The Union lost the election 377 to 362, two ballots being challenged and two being void.

Thereafter, the Union filed objections to Company conduct claimed to have affected the outcome of the election. An unfair labor practice charge of violating §8(a)(1) of Act covering the same and additional conduct was simultaneously filed as permitted by §10(b) of the Act. A complaint issued on the charge and the §9 (election objection) and §10 (unfair labor practice) proceedings were consolidated for hearing. On March 27, 1964, the Trial Examiner issued his decision dismissing the objections and complaint for total lack of merit.

On September 21, 1964, the Board reversed the Trial Examiner, found merit to the complaint, and ordered a new election be held. 148 NLRB 1136 (1964)

Dissatisfied with the order for a new election, the Union moved the Board to reconsider and amend its order to coincide with a new policy of the Board as enunciated in *Bernel Foam Products Co.*, 146 NLRB 1277 (1964), and further refined in *Irving Air Chute Co.*, 149 NLRB 627 (1964). The Board so amended its order and remanded the case to the Trial Examiner to determine whether a bargaining order should issue without a new election.

The Trial Examiner conducted a supplemental hearing and, following the receipt of evidence over the Company's strenuous objection, declared in a Supplemental Decision dated August 27, 1965, that the Union once had a majority

status, that the Board had previously found unfair labor practices had been committed and, *ergo*, consistent with the Board's new policy, the Company must, *inter alia*, recognize and bargain with the Union upon request. On May 3, 1966, the Board affirmed. 158 NLRB No. 48 (1966)

The Union petitioned the Court of Appeals for the District of Columbia for review of the Board order, seeking additional findings and relief. The Board petitioned the same court for enforcement. On March 24, 1967, the Court of Appeals rendered its decision denying the Union's petition for review and granting the Board's petition for enforcement. Both Union and Company petitioned for rehearing and both petitions were denied on April 21, 1967. The Court's decree was entered June 3, 1967.

STATUTES INVOLVED

The pertinent portions of the National Labor Relations Act, 29 USC §151, *et seq.*, are set forth in the Appendix, at pp. App. 8-9.

STATEMENT OF THE CASE

In late February, 1963, the Union began an organizing campaign among the more than 700 production and maintenance workers at the Company's Green Bay, Wisconsin, shovel and crane plant. On March 7, 1963, the Union filed a petition for a board-conducted election and simultaneously sent a letter to the Company claiming that it represented a majority of the employees and requesting a negotiating meeting. The Company replied that it would recognize the labor organization duly certified following a Board-conducted election.

Accordingly, acting upon the Union's petition, the Board directed an election, which was held on May 8, 1963. The Union lost the election, 377 to 362.

After various maneuvers by the Union and action by the Board (see Proceedings Below, *supra*), a supplementary hearing was held by the Trial Examiner at which time the efficacy of the Union authorization cards and their authenticity became an issue. Over the Company's strenuous objection, 453 Union-solicited cards were admitted into evidence without proper foundation or authentication. To the Company's contention that §10(b) of the Act requires that the rules of evidence applicable to the United States District Courts be followed in Board proceedings insofar as practicable, the Board affirmed the Trial Examiner's evidentiary ruling on the grounds that it was "reasonable procedure" in view of "the large number of cards involved" and that the Company had "uncircumstantially" made an "extra-judicial admission" because it had received the cards in its possession prior to hearing and had not raised any issue other than a few questioned signatures.

These cards having been admitted into evidence the Company contended that they were invalid for the purpose intended because they were misleading on their face and tainted by the atmosphere in which they were solicited. Such card reads as follows:

AUTHORIZATION

I hereby request and accept membership in the UNITED STEELWORKERS OF AMERICA, and of my own free will hereby authorize the UNITED STEELWORKERS OF AMERICA, its agents or representatives, to act for me as a collective bargaining agency in all matters pertaining to rates of pay, wages, hours of employment, or other conditions of

employment, and to enter into contracts with my employer covering all such matters, including contracts which may require the continuance of my membership in the UNITED STEELWORKERS OF AMERICA as a condition of my continued employment.

DATE .....

Signature

ADDRESS .....

Street City Zone State

HOME PHONE ..... COMPANY .....

DEPT. ..... SHIFT .....

This card when signed will be shown to no one except an Authorized Representative of the U.S. Government

Please fill out entire card

The Trial Examiner held that evidence of the Union's exaggerations or even untrue statements surrounding the card solicitation was insufficient to invalidate the cards as proof of majority status; that the Courts had not followed this rule, but he was bound by Board decisions. (Jt. App. 230)

Reasons for Granting the Writ

The decision of the Court of Appeals for the District of Columbia herein should be reviewed because it establishes important substantive and procedural principles affecting the right of employees to freely choose their bargaining representatives by secret ballot in the manner specified by Congress in §9(c) of the Act. While this Court specifically held in *Franks Bros.* v. *NLRB*, 321 U.S. 702 (1944), that the Board had the power under §10(c) of the Act to affirmatively order an employer to bargain with a union even though there had been no election, this affirmance came where the union had withdrawn the petition for election upon discovering alleged unfair practices—*i.e.*, acted in conformance with the election rule reaffirmed by the Board in *Aiello Dairy Farms*, 110 NLRB 1365 (1954).

This case, at the supplemental Board decision level, extended the rule in *Franks Bros., supra*, to affirm a bargaining order where the union had proceeded to an election in the face of existing unfair labor practices and then *lost* the election. This result was a permissible rationale by the Board because it had reversed its prior election rule in *Bernel Foam Products Co.*, 146 NLRB 1277 (1964), and *Irving Air Chute Co.*, 149 NLRB 627 (1964).

Under the rule established by the Court below in affirming the Board's order, employees are denied the right to reject a collective bargaining representative and are forced into representation in the name of "effectuating policies of the Act" through Board-imposed remedy. The Circuit Courts have reached conflicts in both the substantive and procedural questions involved.

1. There is a direct conflict between the decision of the Court of Appeals for the District of Columbia herein and a decision of the Court of Appeals for the Second Circuit.

After the employees rejected the union in the Board-conducted election, a full and complete hearing was had before the Trial Examiner on the alleged violations of the Act. The Trial Examiner, who saw the witnesses, observed their demeanor and resolved all credibility issues from face-to-face confrontation, issued his Decision and Report on Objections recommending dismissal of the complaint and overruling the objections *entirely*. (Jt.App., pp. 161 *et seq.*) The Board reversed, and the Court below affirmed, saying:

> "While the evidence is hardly overwhelming, our evaluations are irrelevant because, after examining the record, we have concluded that the Board's findings do represent reasonable interpretations of the evidence."

Nevertheless, the Court below sustained the Board's Order requiring Northwest to bargain with the Union on demand, despite the employees' prior rejection in a secret ballot Board-conducted election and despite the lack of "overwhelming evidence" of any rejection by Northwest of the collective bargaining principle.

The Court below openly states its conflict with the majority decision of the Second Circuit in *NLRB* v. *Flomatic Corp.*, 347 F. (2d) 74 (CA-2, 1965). There it was held that a bargaining order should not issue as part of the remedy for §8(a)(1) violations unless the violations are

"flagrant" and stem from an "aggressive or planned campaign at dissipating union strength by resort to threats, discharges, or refusals of recognition." *Supra*, p. 78. This rule would seem to be consistent with this Court's rule in *Franks Bros. Co.* v. *NLRB, supra*, where a bargaining order was sustained upon a showing of the employer's "stubborn refusal to abide by the law." (p. 705) By way of contrast, Northwest Engineering was "interpretively" found to have committed unfair labor practices.

The Court of Appeals for the Seventh Circuit has attempted to state a rationale for the divergent views expressed between the circuits. In *Wausau Steel Corp* v. *NLRB*, ... F.(2d) ....., 55 CCH Lab. Cases ¶11,849, (CA-7, 1967), with a dissent, a bargaining order issued by the Board was enforced on the ground that it was within the bounds of allowable discretion and not clearly inappropriate. The Court there noted that in other cases where a bargaining order was not issued but a new election ordered instead, the courts relied on record evidence independent of the election results which indicated a lack of majority status in the union. Further, the Court observed that bargaining orders were generally enforced where there was strong evidence of majority status existing prior to the commission of unfair labor practices. The majority then concluded that there was in the case before it only authorization cards to prove majority status and only the election results to prove minority status; that there was "a dearth of evidence" and consequently it was impossible to determine whether the unfair conduct affected the employees' freedom of choice. Accordingly, it held that the Board's *inference* that the un-

lawful conduct dissipated the union's majority status could not be set aside.[1]

The conflict between the decision here and *Flomatic*, with the attendant attempt by the other circuits to find a common ground, emphasizes the need for penetrating examination and resolution of the conflict by this Court. Even the most provocative article on the subject of extended Board remedies has suggested that the Board should act with restraint and restrict its use of bargaining orders to cases involving discriminatory discharges or *clear threats* of retaliation. Bok, *The Regulation of Campaign Tactics*, 78 Harv. L. R. 38, 138 (Nov., 1964)). This Court's definitive ruling is desirable and this case presents a ripe situation for setting forth appropriate distinctions in this regard.

2. The decision below decides an important question of federal law which has not been, but should be, settled by this Court.

The Court below states that, "It was duly found, by both the Trial Examiner and the Board, that prior to the

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[1] It is respectfully submitted that this decision lacks the ring of clear logic that Judge Hastings generally propounds. He states on the one hand that there is inadequate evidence to show that the election results were tainted by unlawful conduct, but then states that the Board's inference of the opposite result cannot be impugned. Overlooked are the propositions that (a) under §10(c) of the Act, the General Counsel has the burden to prove violations by a preponderance of proof, and (b) while the Board may draw inferences, it is permitted to do so only upon *facts found*. *Interlake Iron Corp.* v. *NLRB*, 131 F.(2d) 129 (CA-7, 1942); *NLRB* v. *Pick Mfg. Co.*, 135 F.(2d) 329 (CA-7, 1943). In *Wausau*, the Court admits there is no evidence to support the inference, but nevertheless incongruously says it cannot be set aside.

Company's unfair labor practices a majority of the employees in the appropriate bargaining unit had signed union authorization cards." This statement passes over without comment or resolution two issues, tried before the Trial Examiner and the Board and briefed and argued to the Court below: (a) that the cards were an accurate indicia of majority status; and (b) that they were properly received into evidence.

(a) Are authorization cards probative evidence of majority status ante-unfair labor practices?

It has been said in several cases in several Circuits in several ways that union authorization cards are a "notoriously unreliable method of determining majority status of a union." *Peoples Service Drug Stores, Inc.* v. *NLRB*, 375 F.(2d) 551 (CA-6, 1957); *NLRB* v. *Morris Novelty Co., Inc.*, ... F.(2d) ....., 55 CCH Lab. Cases ¶11,998 (CA 8, 1967); *Pizza Products Corp.* v. *NLRB*, 369 F.(2d) 431 (CA-6, 1966); *NLRB* v. *Flomatic Corp., supra; NLRB* v. *Gorbea, Perez & Morell, etc.*, 300 F.(2d) 886 (CA-1, 1962); *NLRB* v. *Hannaford Bros.*, 261 F.(2d) 638 (CA-1, 1959). Even Board Chairman McCulloch has noted that unions win only 52% of the elections where they present authorization cards from 50% to 70% of the employees. See statement quoted in *NLRB* v. *Johnnie's Poultry Co.*, 344 F.(2d) 617 (CA-8, 1965).

Despite this asserted unreliability, the various circuits have independently developed conflicting rules under which authorization cards have been held to be satisfactory or unsatisfactory proof of majority status. Thus has developed the doctrines applicable to single purpose and dual purpose authorization cards. The single purpose card which recites only that it is to be used to evidence interest

in obtaining an NLRB-conducted election does not pose a problem. Here, the Board and courts have uniformly held that such cards do not constitute proof of majority status so as to form a basis for a bargaining order as an affirmative remedy.

On the other hand, so-called dual purpose cards have brought conflicting results in the various circuits. Thus, in the Fifth and Sixth Circuits, cards which call for an election *and* authorize representation would appear to be invalid proof of majority status if there is *any* showing of misrepresentation or misunderstanding as to the meaning or intent of the signers. *NLRB* v. *Peterson Bros., Inc.*, 342 F.(2d) 221 (CA-5, 1965); *Dayco Corp.* v. *NLRB*, ... F. (2d) ....., 56 CCH Lab. Cases ¶12,113 (CA-6, 1967). Subjective intent of the signers in these circuits is an important issue. *Engineers & Fabricators, Inc.* v. *NLRB*, ... F. (2d) ....., 55 CCH Lab. Cases ¶11,850 (CA-5, 1967). In the Seventh, Tenth and District of Columbia Circuits, however, if the dual purpose is plain on the face of the card, *cf., Int'l Union of Elec. Wkrs. (SNC Mfg. Co.)* v. *NLRB*, 352 F.(2d) 361 (CADC, 1965), the card will generally constitute sufficient evidence of majority status to support a bargaining order, *Int'l Union UAW* v. *NLRB (Aero Corp.)* 363 F. (2d) 702 (CADC, 1966); *NLRB* v. *C.J. Glasgow Co.*, 356 F.(2d) 476 (CA-7, 1966), *Furr's, Inc.* v. *NLRB*, ... F.(2d) ....., 55 CCH Lab. Cases ¶11,734 (CA-10, 1967), at least, in the absence of substantial evidence of active and overt fraud. See, *NLRB* v. *Kroehler*, 328 F.(2d) 770 (CA-7, 1964); *Amalgamated Clothing Workers* v. *NLRB*, 365 F.(2d) 898 (CADC, 1966). In these circuits it is even doubtful that evidence of the signers' intent can be admitted into evidence. See, *Joy Silk Mills* v. *NLRB*, 185 F.(2d) 732 (CADC, 1950).

Resolution of these conflicting decisions is desirable so that employees' rights are treated uniformly under the Act.

(b) What degree of authentication is required to equate authorization cards to ballots?

The Act provides in §10(b) that the Board shall follow the rules of evidence applicable to the United States District Courts insofar as practicable. In the case at bar the Board admitted some 400 cards into evidence without proof of execution on the theory that to prove each card's authenticity would be impractical. (J.A. 263) The Board has previously held that where a small number of cards are involved, there must be actual, individual proof. See, *e.g., Henry Colder Co.*, 163 NLRB No. 13, (1967).

Actually, the rule of evidence applicable in the district courts of the United States is that a writing standing alone does not constitute evidence; it must be accompanied by proof establishing its authenticity and that it was executed by the party by whom it purports to be. See Am.Jur. (*Evid.*) §922, pp. 776-777; *Toho Bussan Kaisha, Ltd.* v. *American Pres. Lines, Ltd.*, 265 F.(2d) 418, 422 (CA-2, 1959); *Summers* v. *McDermott*, 138 F.(2d) 338 (CA-3, 1943); *International Aircraft Trading Co., Inc.* v. *U.S.*, 75 F.Supp. 261, 262 (Ct.Cl., 1947); *cf., Olender* v. *U.S.*, 210 F.(2d) 795, 801-805 (CA-9, 1954) ("official government documents" exception limited to those actually "official").

The viciousness of the Board's ambivalence in application of the evidentiary standard is apparent where it is remembered that these cards are being equated to votes cast in a secret ballot election. These cards are not collected in secret, may not represent the true wishes of those

solicited and, as here, often given upon the representation that there will be a secret ballot. With a large number of cards in issue, to be sure, the proceedings for proof of their authenticity may be protracted if the union is to obtain bargaining rights by "the back door" route. On the other hand, the Board has an adequate and better alternative by merely following the statute: hold an election guaranteeing the secret ballot franchise.

Under the decision below, the Board now has a *carte blanche* to deliver any number of cards to the employer and in the absence of his disproving them, have them admitted into evidence as proof of majority status. The Board has repeatedly said that there are no discovery procedures available under the Act, *Chambers Mfg. Corp.*, 124 NLRB 721 (1959), *enf'd.*, 278 F.(2d) 715 (CA-5, 1960), yet it has adopted a procedure here giving it the unilateral right to demand that employers admit or deny authenticity and if they remain mute, they will be deemed to have made an "extra-judicial admission" of authenticity.

3. The Court below has approved a Board practice which so far departs from accepted practice as to call for an exercise of this Court's power of supervision.

In what is believed to be the first decision of its kind, the Board here ordered Northwest to recognize and bargain with the Union, although *at no time* in these proceedings was Northwest ever charged nor did any allegation of the complaint ever charge that Northwest had refused to bargain when it was under an obligation to do so. The Act provides in §10(b) that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board.

Every decision dealing with the efficacy of a bargaining order, in the absence of or in contravention to the results of a Board-ordered election, has had present at the outset an allegation in the complaint that the employer violated §8(a)(5) of the Act. And heretofore, even in the District of Columbia Circuit it was held that there must have been a charge within six months of the violation—albeit, a continuing violation. See, *Int'l. Union, UAW* v. *NLRB, (Aero Corp.), supra.*

Here, there was no charge, *ever*,—no allegation of refusal to bargain, *ever*. This procedure of the Board is so beyond the accepted practice as to call for this Court's supervisory review and reversal.

4. The questions presented are important to the administration of the National Labor Relations Act and should be resolved by this Court.

The Act, in §7, guarantees to employees the right to participate or to refrain from participating in concerted activities. This announced and explicit policy of Congress is being seriously and substantially intruded upon by recent developments of Board-created law now being approved in varying degrees in the Courts of Appeal. Conflicts are developing and uncertainty is present. The Board, on the other hand, is pushing to extend its remedial powers by devising new and different affirmative relief. It is appropriate to review the Board's power in this regard and establish firm guidelines for future decisions.

This Court has previously said that the Board's power to order affirmative relief does not confer upon it the power to inflict any penalty it may choose just because the policies of the Act might be thereby effectuated, because affirma-

tive orders must be incidental to and in aid of the primary right of the Board to stop and restrain violations. *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 235-236 (1938); *Int'l. Union, UAW* v. *Russell*, 356 U.S. 634, 642-643 (1958). In the face of an announced intent, manifested in this case, to expand and invent new remedies, failure of the Court to now pronounce its views may well lead to further conflicts among the Circuits and the development of relationships premised on faulty assumptions, all in derogation of employees rights and the intent of Congress.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

WALTER S. DAVIS,
Counsel for Northwest Engineering Company

Of Counsel:
F. N. TROWBRIDGE

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,921

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

NORTHWEST ENGINEERING COMPANY,
INTERVENOR

No. 20,211

NATIONAL LABOR RELATIONS BOARD,
PETITIONER

v.

NORTHWEST ENGINEERING COMPANY,
RESPONDENT

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
INTERVENOR

On Petition to Review and on Petition to Enforce Orders of the National Labor Relations Board

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Decided March 24, 1967

Mr. Michael Gottesman, with whom *Mr. Elliot Bredhoff* was on the brief, for petitioner in No. 18,921 and intervenor in No. 20,211.

Mrs. Janet Kohn, Attorney, National Labor Relations Board, with whom *Messrs. Arnold Ordman,* General Counsel, *Dominick L. Manoli,* Associate General Counsel, *Marcel Mallet-Prevost,* Assistant General Counsel, and *Warren M. Davison,* Attorney, National Labor Relations Board, were on the brief, for respondent in No. 18,921 and petitioner in No. 20,211.

Mr. Walter S. Davis of the bar of the Supreme Court of Wisconsin, *pro hac vice,* by special leave of court, with whom *Mr. E. Riley Casey* was on the brief, for respondent in No. 20,211 and intervenor in No. 18,921. *Messrs. O. S. Hoebroeckx* and *Richard P. McLaughlin* also entered appearances for respondent in No. 20,211 and intervenor in No. 18,921.

Before BASTIAN, *Senior Circuit Judge,* LEVENTHAL and ROBINSON, *Circuit Judges.*

LEVENTHAL, *Circuit Judge*: We are called upon to review an order of the National Labor Relations Board issued on September 24, 1964, 148 N.L.R.B. 1136, and amended after further hearings on May 3, 1966, 158 N.L.R.B. No. 48. The facts and issues are fully detailed in those opinions and we pause only to refer to the most salient findings. The Board found that after the petitioner, United Steelworkers (Union), began its organizing drive at the Green Bay, Wisconsin shovel and crane plant of Northwest Engineering Co. (Company), the Company responded with a flurry of promises and threats, all designed to an impermissible degree to fob off unionization. The Board's findings of fact are conclusive on us if supported by substantial evidence on the record as a whole. National Labor Relations Act, 61 Stat. 146 (1947), as amended, 29 U.S.C. § 160(f) (1964); Administrative Procedure Act, 5 U.S.C. § 706. While the evidence is hardly

overwhelming, our evaluations are irrelevant because, after examining the record, we have concluded that the Board's findings do represent reasonable interpretations of the evidence.

We turn to the Board's remedies. The Board issued the customary order requiring the Company to cease and desist from interferences with union activity, and in addition set aside a certification election adverse to the Union, and ordered the Company to bargain with the Union. Both Union and Company protest the validity of the order, the Union on the ground that it does not go far enough, the Company on the ground that it goes too far. We affirm.

Section 10(c) of the Act, 29 U.S.C. §160(c) (1964), authorizes the Board when it has found a violation to "issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this [Act]. . . ." In fashioning remedies the Board is drawing on its peculiar expertise and reservoir of informed judgment gained from continuous and intimate study of labor relations problems. Because of this, courts must pay special deference to the Board's choice of a remedy, see *Fibreboard Paper Prod. Corp.* v. *NLRB*, 379 U.S. 203, 215-17 (1964). "[I]t is usually better to minimize the opportunity for reviewing courts to substitute their discretion for that of the agency." *Consolo* v. *FMC*, 383 U.S. 607, 621 (1966). With this caution in mind, we cannot say it was an abuse of discretion for the Board to fail or refuse to grant the Union's prayer that it "award to the employees . . . the benefits they would most likely have achieved had bargaining occurred" or "order the Company to bargain now with

the Union over benefits to be provided for the retroactive period."

We likewise reject the Company's objection challenging the remedy as excessively disproportionate to the violation charged. The 1964 opinion and order of the Board found a violation of Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1) (1964), in that the Company interfered with, coerced, and restrained its employees in the exercise of their rights under Section 7 to organize and bargain collectively. In addition to the customary cease and desist order, the Board set aside the previous certification election, which the Union had lost by a slim vote, and ordered a new one. Even though there had been no charge or finding of a violation of Section 8(a)(5), which proscribes refusals to bargain with representatives of employees, the Board later, on the Union's motion, reopened the proceedings. It was duly found, by both the Examiner and the Board, that prior to the Company's unfair labor practices a majority of the employees in the appropriate bargaining unit had signed union authorization cards. Cf. *Amalgamated Clothing Workers (Hamburg Shirt Corp.)* v. *NLRB*, —— U.S.App.D.C. ——, —— F.2d —— (Nos. 19897, 19940, decided December 15, 1966) (slip op. at 7-9). In its 1966 Supplemental Decision and Order the Board directed the Company to bargain with the Union without the necessity of a new election.

In attacking this bargaining order the Company relies on the recent Second Circuit case of *NLRB* v. *Flomatic Corp.*, 347 F.2d 74, 77-80 (1965). In that opinion the court refused to enforce a bargaining order entered to rectify a violation of Section 8(a)(1) alone. Judge Anderson, writing for the court stated that "restraint" was indicated in regard to the dictation of the "strong medicine"

of a bargaining order, because of its troublesome tendency to encroach on the employees' Section 7 right *not* to organize a labor union and the Section 9(c)(1) right to a secret ballot election.[1] Judge Anderson implies that a bargaining order would be approved only when the Company's conduct consisted of a "broad-gauged campaign" that was "flagrantly hostile to the organizing efforts" of the Union, where there were "glaring violations." He states that a bargaining order is inappropriate in the case of "a borderline, unaggravated § 8(a)(1) violation, standing alone," resulting in only "a moderate unbalancing of an election by an employer." The opinion concludes that in such a case "a more appropriate remedy" is a cease and desist order coupled with the granting of a new election.

In our view the beacon with the light that guides this court is not the *Flomatic* opinion, but the partial dissent of Judge Hays, 347 F.2d at 80-81. As we have stated, the choice of remedies is primarily within the province of the Board. The Board has the responsibility for deciding what relief is most "appropriate" and in the absence of a clear abuse of discretion we will not interfere. Even where the particular remedy carved out by the Board has an impact on other values protected by the National Labor Relations Act, it is the Board that has the primary duty of reconciling sometimes divergent interests. It is not judicial abdication to treat with respect the agency's

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[1] In Local 57, ILGWU (Garwin Corp.) v. NLRB, —— U.S. App.D.C. ——, —— F.2d —— (Nos. 19478, 19624, decided January 11, 1967), this court gave similar reasons for refusing to enforce a bargaining order against a "runaway shop." However in *Garwin*, unlike this case, the order set aside would not have served to protect any Section 7 rights of employees who chose the Union as their representative.

determination as to the powers properly invoked in coping with a problem. *Philadelphia Television Broadcasting Co.* v. *FCC*, 123 U.S.App.D.C. 298, 300, 359 F.2d 282, 284 (1966). The inquiry is whether on the basis of the evidence it had before it the Board adopted a remedy reasonably calculated to effectuate the policies of the Act.

The Supreme Court has recently re-emphasized the established rule that courts must give deference to the choice of remedy made by the administrative agency, unless it reflects so gross an abuse of power as to be arbitrary. See *Consolo* v. *FMC, supra; FCC* v. *WOKO, Inc.*, 329 U.S. 223, 227-28 (1946). In the particular area of federal regulation of labor relations the courts do not have a charter to insist upon especially strong evidence of violation as a precondition to an affirmative remedy within the Board's jurisdiction. *NLRB* v. *Walton Mfg. Co.*, 369 U.S. 404, 407 (1962); *NLRB* v. *Camco, Inc.*, 340 F.2d 803, 808 (5th Cir.), *cert. denied*, 382 U.S. 926 (1965).[2] In the present case the Board's findings establish not only a violation of Section 8(a)(1), but also an interference with the bargaining agent designated by a majority. We are unable to say that it was arbitrary for the Board to conclude that a reasonable vindication of the Act and its purposes is best served by returning these parties to the *status quo ante* and compelling the Company to commence bargaining.

The Union's petition to review is denied, and the Board's petition to enforce is granted.

So ordered.

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[2] Compare FCC v. Allentown Broadcasting Corp., 349 U.S. 358 (1955), where the Court rejected a contention that the preponderance of testimony must be "very substantial" to warrant an agency in overturning an Examiner's finding.

(Caption Omitted)

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

(Filed June 3, 1967)
Nathan J. Paulson, Clerk

DECREE

BEFORE: *Bastian, Senior Circuit Judge, Leventhal and Robinson, Circuit Judges.*

The above consolidated cases came on to be heard upon a petition for review and amended petition for review filed by United Steelworkers of America, AFL-CIO and upon the petition of the National Labor Relations Board for enforcement of its Order dated September 21, 1964, against Northwest Engineering Company, its officers, agents, successors, and assigns, as amended May 3, 1966. The Court heard argument of respective counsel on November 22, 1966, and has considered the briefs and transcript of record filed in this cause. On March 24, 1967, the Court, being fully advised in the premises handed down its decision denying the Union's petition to review, and granting the Board's petition to enforce said order, as amended and entered judgment accordingly.

On Consideration Whereof, it is ordered, adjudged and decreed by the United States Court of Appeals for the District of Columbia Circuit that the said order, as amended, of the National Labor Relations Board in said proceedings be enforced, and that Northwest Engineering Company, its officers, agents, successors, and assigns abide by

and perform the direction of the Board in said order contained.

Walter M. Bastian
Senior Circuit Judge, United States Court of Appeals for the District of Columbia Circuit

Harold Leventhal
Circuit Judge, United States Court of Appeals for the District of Columbia Circuit

Spottswood W. Robinson, III
Circuit Judge, United States Court of Appeals for the District of Columbia Circuit

STATUTES

National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*):

"Section 7—

Employees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . ."

Section 10—

* * *

"(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at

a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge."

* * *

"Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C)."

* * *

"(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.: . . ."